

## **Agenda**

### **D.C. OFFICE OF EMPLOYEE APPEALS (“OEA”) BOARD MEETING**

Tuesday, March 20, 2018 at 11:00 a.m.

Location: 955 L’Enfant Plaza, SW, Suite 2500

Washington, DC 20024

#### **I. Call to Order**

#### **II. Ascertainment of Quorum**

#### **III. Adoption of Agenda**

#### **IV. Minutes Reviewed from Previous Meeting**

#### **V. New Business**

##### **A. Public Comments on Petitions for Review**

##### **B. Summary of Cases**

###### **1. Brendan Cassidy v. D.C. Public Schools, OEA Matter No. 2401-0253-10R13R16 --**

This matter has been previously before the OEA Board. By way of background, Brendan Cassidy (“Employee”) worked as an English teacher with the D.C. Public Schools (“Agency”). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force (“RIF”). The Administrative Judge (“AJ”) issued his Initial Decision on April 10, 2012. In its July 2013 Opinion and Order, the OEA Board found that the AJ failed to consider all material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ to consider Employee’s arguments.

On remand, the parties engaged in an extensive discovery process and an evidentiary hearing was held by the AJ. Of importance to note, was Employee’s assertion that Agency failed to use D.C. Official Code § 1-624.08 and District Personnel Manual (“DPM”) Chapter 24 when conducting the RIF action against him. The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08, instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. However, the AJ improperly relied on Title 5, DCMR § 1503.2 et al. and 1503.1 when analyzing Employee’s one round of lateral competition.

Employee filed a Petition for Review on Remand on July 2, 2015. He contended that the AJ’s decision failed to consider that Agency did not properly administer the RIF because of its use of Title 5, DCMR § 1503.2 et al., instead of DPM Chapter 24. On August 5, 2015, Agency filed its Response to Employee’s Petition for Review on Remand. It provided that if DPM Chapter 24 should have been considered, it still complied with those requirements. Accordingly, Agency requested that the OEA Board uphold the AJ’s Initial Decision on Remand.

On September 13, 2016, the OEA Board held that in accordance with *Webster Rogers, Jr. v. D.C. Public Schools*, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Accordingly, the matter was remanded to the AJ a second time, for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as required in D.C. Official Code § 1-624.08.

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on whether Agency complied with DPM Chapter 24. On October 24, 2016, Employee filed a Motion Requesting Certification of

an Interlocutory Appeal. In his motion, Employee argued that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.

Subsequently, on October 27, 2016, the AJ issued an order granting Employee's certification of the Interlocutory Appeal to the OEA Board. On January 24, 2017, the Board issued an order granting Employee's Interlocutory Appeal. The Board determined that it would have been improper for the AJ to request additional briefs on DPM Chapter 24. It reasoned that Agency should not be allowed another opportunity to provide additional arguments through the submission of briefs. Accordingly, the Board granted the Interlocutory Appeal and remanded the matter to the AJ with instructions to determine whether the RIF resulting in Employee's termination was conducted in accordance with Chapter 24 of the DPM.

On March 10, 2017, Agency issued a Notice of Supplemental Authority. It argued that the D.C. Court of Appeals decision in *Vilean Stevens and Ike Profit v. District of Columbia Department of Health*, 150 A. 3d 307 (D.C. 2016), affirmed the decision of the OEA and the Superior Court, but the Court made several determinations that were directly counter to OEA's position on the application of the Abolishment Act. Employee filed a Motion to Exclude on March 17, 2017. He, again, requested that Agency not be allowed an opportunity to provide additional arguments or authority.

On May 25, 2017, the AJ issued his Second Initial Decision on Remand. The AJ held that he could not rely on the arguments presented in Agency's Notice of Supplemental Authority. He explained that doing so would run afoul with the clear instructions given by the OEA Board in its Opinion and Order on Motion for an Interlocutory Appeal. Without referencing any of the regulations outlined in DPM Chapter 24, the AJ determined that the RIF was properly conducted under the Abolishment Act; that Employee offered no proof that the competitive level and area in the instant matter were not properly constructed; that Employee was afforded one round of lateral competition; and that Agency provided Employee the required thirty-day notice. The AJ concluded that Employee's CLDF score was accurate and removal was appropriate because of his placement as the lowest ranked ET-15 English teacher at Agency. Accordingly, he upheld Agency's RIF action against Employee.

On June 29, 2017, Employee filed a Petition for Review of the Second Initial Decision on Remand. He argues that the AJ's decision to dismiss his appeal was factually and legally incorrect. Employee states that he presented evidence to support a favorable ruling that Agency did not apply the regulations in Chapter 24 of the DPM. He explains that the AJ's decision failed to address or even acknowledge any aspect of DPM Chapter 24. Further, he argues that the decisions issued by the AJ were not based on substantial evidence and included an erroneous interpretation of statute and regulations. Employee contends that his due process rights were violated and that the AJ provided clear evidence of bias and a perceived lack of judicial integrity. Therefore, he requests that the OEA Board apply DPM Chapter 24 to the facts of his case and reverse the Second Initial Decision on Remand and the RIF action.

Agency filed its response to Employee's petition on August 3, 2017. It submits that the AJ was correct in finding that it complied with Chapter 24. It is Agency's position that both Title 5, DCMR § 1503 and DPM Chapter 24 outline similar factors to be taken into account when providing one round of lateral competition. Further, Agency denies Employee's assertions that it failed to place him on a Priority Reemployment list. Agency, again, argues that the ruling in *Stevens v. District of Columbia Department of Health* overruled the OEA's decision that its RIFs were conducted pursuant to the Abolishment Act, instead of D.C. Official Code § 1-624.02. Therefore, it requests that this Board uphold the AJ's ruling.

**2. Georgia Stewart v. D.C. Office of Human Rights, OEA Matter No. J-0006-17** – Georgia Stewart (“Employee”) worked as a Supervisory Equal Opportunity Specialist with the D.C. Office of Human Rights (“Agency”). On September 30, 2016, Agency issued a final notice of separation to Employee.

On October 28, 2016, Employee filed a Petition for Appeal with OEA. She asserted that she was forced out of her Career Service status and placed in Management Supervisory Service (“MSS”). Employee believed that her failure to comply with the change in designation would have resulted in her termination. According to Employee, she was the only MSS employee targeted and terminated. Moreover, she argued that she was subjected to a hostile work environment. Therefore, Employee requested that she be reinstated and assigned to another Agency in a comparable position. Alternatively, she sought front pay for the three years she intended to work before she would have retired.

Agency filed a Motion to Dismiss Employee’s Petition for Appeal on November 21, 2016. It cited to *Jeffery E. McInnis v. D.C. Department of Parks and Recreation*, OEA Matter No. 1601-0138-15 (January 15, 2016), and stated that OEA has consistently held that it could not adjudicate the appeals of MSS employees, given their at-will status. Agency explained that pursuant to D.C. Official Code § 1-609.51, individuals appointed to MSS are “not in the Career, Educational, Excepted, Executive, or Legal Service.” In accordance with D.C. Official Code § 1-609.51 and 6B DCMR § 3813.3, MSS employees serve in an at-will appointment, and therefore, they are not subject to administrative appeals. Thus, it was Agency’s position that MSS employees are statutorily excluded from the protections afforded to Career Service employees. Accordingly, it requested that Employee’s petition be denied.

On February 24, 2017, Employee filed her response to Agency’s Motion to Dismiss. She, again, argued that she was Career status and not a MSS employee. According to Employee, Agency submitted an unsigned and undated position description as proof that she was a MSS employee. However, she explained that there were documents which proved that she was on the District Service pay scale. Therefore, it was her position that Agency’s evidence was contradictory and failed to serve as uncontroverted evidence. Additionally, Employee argued that Agency was required to adhere to regulations to establish a MSS position. She also alleged that she did not apply for the position of Supervisor of Mediation, MSS – MS-14. Thus, she argued that OEA did have jurisdiction to consider her matter.

On March 13, 2017, Agency filed its reply to Employee’s Response to Agency’s Motion to Dismiss. Agency argued that pursuant to D.C. Official Code §1-609.58(a), “persons currently holding appointments to positions in the Career Service who meet the definition of ‘management employee’ as defined in § 1-614.11(5) shall be appointed to the Management Supervisory Service unless the employee declined the appointment.” Agency contended that Employee did not exercise her right to decline her appointment in 2002, when she was converted to a MSS status. It asserted that Employee was also well aware of her training obligations and fulfilled this duty annually since her transition to the MSS status. Accordingly, it requested that Employee’s petition be denied and that Agency’s Motion to Dismiss be granted.

Employee replied to Agency’s response on April 3, 2017. She argued that Agency failed to present evidence that her position was being converted to an MSS position or that she had the right to either decline or accept the position. Employee claimed that this was a violation of her due process rights. Therefore, it was her position that she was not an MSS employee.

On April 12, 2017, the AJ issued his Initial Decision. He held that District of Columbia Municipal Regulations (“DCMR”) § 3813.1 provides that an appointment to a MSS position is an at-will appointment and an employee may be terminated at any time. The AJ found that from 2002 through 2015, Employee consistently completed mandatory and elective MSS courses. He opined that Employee’s fulfillment of her annual mandatory MSS training and courses demonstrated that she was fully aware of her MSS status. Furthermore, the AJ disagreed with Employee’s argument that the District Service (“DS”) salary schedule was not the appropriate pay plan for MSS employees. He explained that in accordance with DPM § 1125.1, all employees appointed under Career, Legal, or Management Supervisory Services were paid under the DS Salary System or the Wage Service Rate System. Furthermore, he determined that because DPM § 3813.3 provides that severance is awarded at the discretion of the Agency head, Employee’s argument that she was entitled to severance lacks merit. Accordingly, the AJ dismissed the appeal for lack of jurisdiction.

On May 17, 2017, Employee filed a Petition for Review of the Initial Decision. The petition raises four questions: whether the AJ erred as a matter of law in ruling on Agency’s motion to dismiss; whether the AJ’s decision is unsupported by preponderance of the evidence in the record; whether the AJ erred as a matter of law by not conducting an evidentiary hearing; and whether the AJ erred in his interpretation of statute. There are no supporting arguments provided by Employee; she merely raised the above-mentioned questions.

Agency filed its response to Employee’s Petition for Review on June 13, 2017. It argues that Employee’s petition was filed untimely. Furthermore, Agency explains that the appeal fails to present evidence for the OEA Board to grant Employee’s request, as required by OEA Rule 633.3. Therefore, it requests that the petition be denied.

**3. Michael Skelly v. Metropolitan Police Department, OEA Matter No. 1601-0001-16 –** Michael Skelly worked as a Sergeant with the Metropolitan Police Department. On October 15, 2014, Agency issued a Notice of Proposed Adverse Action, charging Employee with engaging in conduct constituting a crime; failure to obey orders and directives issued by the Chief of Police; conduct unbecoming of an officer; and prejudicial conduct. Employee requested that an Adverse Action Panel (“Trial Panel”) review the charges and specifications against him. The Trial Panel subsequently recommended that Employee be terminated based on each of the four charges. On June 2, 2015, Agency issued its Final Notice of Adverse Action, sustaining the Panel’s recommendation. Employee’s termination became effective on September 4, 2015.

Employee filed a Petition for Appeal with OEA on October 2, 2015. In his appeal, Employee argued that his termination was improper and requested that he be reinstated with back pay and benefits. Agency filed its Answer to the Petition for Appeal on November 9, 2015. It denied that Employee was wrongfully terminated and requested a hearing.

An AJ was assigned to the matter in January of 2016. After conducting a prehearing conference, the AJ ordered the parties to submit briefs addressing whether the Trial Panel’s decision was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Agency’s termination action was taken in accordance with all applicable laws, rules, and regulations.

In his brief, Employee alleged that Agency failed to prove that he violated U.S. Code Title 21-843 and argued that he did not commit a crime by altering a prescription for Percocet. Employee further stated that he did not violate Agency’s drug policy because the directive does not prohibit employees from possessing or taking lawfully prescribed medications at work. He opined that the conduct unbecoming charge could not be supported because the accompanying specifications erroneously relied on the credibility of Dr. Lastrapes, a Police and Fire Chief

Physician, who did not testify before the Trial Panel and did not provide an affidavit or written statement. Additionally, Employee posited that he was denied due process regarding Agency's allegation that he was less than truthful to PFC physicians. Lastly, he claimed that the prejudicial conduct charge could not be sustained because there was no rule or regulation which prohibited him from taking medications lawfully prescribed by his treating physicians. Therefore, Employee requested that the Trial Panel's decision be reversed and that Agency's termination action be overturned.

In response, Agency asserted that its conclusions regarding Employee's misconduct were supported by substantial evidence. It stated that the evidence reflected the excessive amounts of controlled narcotics that Employee was taking and the unlawful methods by which he was able to obtain prescriptions for the drugs. Further, Agency argued that Employee provided untruthful information to PFC physicians about the medications he was taking. As a result, it requested that the AJ affirm its termination action.

An Initial Decision was issued on May 17, 2017. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), OEA was limited to making a decision solely on the record if certain conditions were met. Next, the AJ concluded that there was substantial evidence in the record to support a finding that Employee engaged in a scheme to obtain controlled substances. Similarly, the AJ stated that Employee's alteration of a prescription for Percocet was an act which constituted a crime.

With respect to the failure to observe orders charge, the AJ determined that Employee violated Agency's Drug Free Work Place Directive, which prohibits the use of controlled substances in the workplace. According to the AJ, the record reflected that Employee was taking excessive amounts of controlled substances while on duty and failed to notify Agency. Regarding the conduct unbecoming accusation, the AJ provided that Employee was untruthful to Dr. Lastrapes about his regular physician being out of town in an effort to obtain a prescription. Additionally, the AJ stated that Employee was untruthful to PFC physicians about the controlled substances that he was taking. The AJ also dismissed Employee's argument that the record failed to prove that he was guilty of diversion under 21 U.S.C. § 843. After examining the record, the AJ held that the Trial Panel's findings were supported by substantial evidence. Consequently, Employee's termination was upheld.

Employee disagreed and filed Petition for Review with OEA's Board. He argues that the Initial Decision is based on an erroneous interpretation of statute; that the AJ's conclusions of law were not based on substantial evidence; and that the Initial Decision failed to address all issues of law and fact that were properly raised in the appeal. According to Employee, Agency failed to meet its burden of proof in showing that he used an excessive amount of controlled medications over the years or that he fashioned a "scheme" to improperly obtain the drugs. He also disputes the AJ's findings with respect to each of the charges and corresponding specifications provided in Agency's Notice of Proposed Adverse Action. Therefore, Employee asks this Board to reverse the Initial Decision.

Agency filed a Brief in Opposition to Employee's Petition for Review on July 21, 2017. It claims that the Initial Decision is based on substantial evidence. Agency also reiterates its position that Employee engaged in a scheme to obtain excessive amounts of controlled substances for personal use. As such, it asks this Board to uphold the Initial Decision and deny Employee's Petition for Review.

**4. Phillipa Mezile v. Department on Disability Services, OEA Matter No. 2401-0158-09R12** – Phillipa Mezile worked as a Public Affairs Specialist with the Department on Disability Services. On May 12, 2009, Agency informed Employee that her position was being

abolished as a result of a RIF. The effective date of the RIF was June 12, 2009. Employee filed a Petition for Appeal with OEA on July 10, 2009, arguing that the RIF violated District of Columbia laws and that Agency failed to provide her with the requisite thirty-day written notice.

The AJ issued an Initial Decision on April 2, 2010. He stated that D.C. Official Code § 1-624.08 was the applicable RIF statute in this case and that Employee was limited to contesting whether she was afforded one round of lateral competition and whether Agency provided her with thirty days' written notice prior to the effective date of the RIF. After reviewing the record, the AJ concluded that Agency's RIF action was conducted in accordance with all applicable rules, laws, and regulations. Therefore, Employee's separation from service was upheld.

Employee filed a Petition for Review of Agency in D.C. Superior Court on June 3, 2010. In its ruling, the Court agreed with the AJ's ruling that OEA was the wrong venue for adjudicating Employee's discrimination claims. However, it provided that the AJ should have made a finding pertinent Employee's claim that the RIF action was a "sham" based on the arguments that were unrelated to discrimination. Accordingly, the matter was remanded to the AJ for further consideration.

The AJ subsequently issued an Initial Decision on Remand on October 10, 2012. He reiterated D.C. Official Code § 1-624.08 was the more applicable statute in this case because it was conducted as a result of budgetary restraints. With respect to the lateral competition requirement, the AJ stated that OEA has consistently held that when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e) is inapplicable. Thus, Agency was not required to afford Employee with one round of lateral competition because she was the sole Public Affairs Specialist, DS-1035-13-01-N, in her competitive level. The AJ dismissed Employee's claims that there was not a Mayoral Order which authorized and approved the RIF. He further categorized Employee's other arguments as "bare allegations" that were void of supporting proof.

Regarding the notice requirement, the AJ provided that Title 5, Section 1506 of the D.C. Municipal Regulations states that employees selected for separation from service shall be given specific written notice at least thirty days prior to the effective date of separation. In this case, Employee admitted to receiving Agency's RIF notice on May 18, 2009. The notice reflected an effective date of June 12, 2009. Accordingly, both the AJ and the parties conceded that Employee only received twenty-six days' notice prior to the effective date of the RIF. Citing District Personnel Manual § 2405.6, the AJ found that Agency's failure to provide Employee with adequate notice was considered a procedural error and that retroactive reinstatement was not appropriate under the circumstances. However, he ordered Agency to reimburse Employee for four days' of back pay and benefits as a result of Agency's notice error.

On November 14, 2016, Employee, without the assistance of her attorney, filed a Request for Compliance with Initial Decision on Remand. Employee requested that the AJ require Agency reimburse her with back pay and benefits for four days, as ordered in the Initial Decision on Remand. In its response, Agency stated that it forwarded to the District of Columbia Office of Pay and Retirement Services ("OPRS") a request to issue Employee a check in the amount of \$1,807.46, less any applicable federal and District tax withholdings. Thus, Agency maintained that it had taken all of the necessary steps to comply with the Initial Decision on Remand. On January 6, 2017, the AJ issued an Addendum Decision on Compliance. He stated that Agency complied with the Initial Decision on Remand and Employee's motion for compliance was dismissed.

Thereafter, Employee filed a Petition for Attorney's Fees and Costs with OEA on February 6, 2017. In her petition, Employee requested \$48,247.50 in attorney's fees and \$100 in costs. The amount included legal work performed by Attorney David A. Branch before OEA, D.C. Superior Court, and efforts to collect the funds owed to Employee. Agency's response to the motion argued that an award of attorney's fees was not appropriate because Employee was not the prevailing party in this matter and that an award of fees was not warranted in the interest of justice.

The AJ issued an Addendum Decision on Attorney's Fees on June 14, 2017. He first highlighted the holding in *Zervas v. District of Columbia Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993), which held that the initial criterion for fee eligibility is that the employee be the prevailing party on the final decision on the merits of the case. The AJ also noted that the U.S. Supreme Court in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), held that a plaintiff prevails "when the actual relief on the merits of his claim materially alters the legal relationship between parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." According to the AJ, the relief that Employee sought was the reversal of Agency's RIF action; reinstatement to her previous position of record; and back pay and benefits. While Employee did not receive the total relief that she sought because Agency's RIF action was ultimately upheld, she did receive an award of four days' worth of back pay and benefits because of Agency's failure to provide adequate notice of the RIF. Thus, the AJ opined that Employee obtained "an actual, if nominal, relief on the merit[s] of her claim that she was not given the full thirty-day notice required by law."

With respect to whether the payment of attorney's fees was warranted in the interest of justice, the AJ again referenced the holding in *Farrar*, which recognized that "the degree of the plaintiff's overall success goes to the success the reasonableness of the fee award." He concluded that Employee only obtained a minimal amount of success because she received compensation for four days' worth of back pay instead of a reversal of the RIF. Considering that Employee requested attorney's fees and costs in the amount of \$48,347.50 after obtaining an award of approximately \$1,800, the AJ opined that a fee award was unreasonable and unwarranted in the interest of justice. Therefore, her petition for attorney's fees was denied.

Employee subsequently filed a Petition for Review of Addendum Decision on Attorney's Fees with the OEA Board on July 19, 2017. She argues that the AJ erred in finding that she was not entitled to any attorney's fees for appealing the April 2, 2010 Initial Decision to D.C. Superior Court. Employee also contends that the AJ failed to show special circumstances which would make an award of fees unjust. Additionally, Employee states that the AJ incorrectly characterized her recovery of \$1,807.46 in back pay as nominal damages to justify the refusal of an award. According to Employee, the fees requested are reasonable and exclude fees incurred in appealing this matter to the D.C. Court of Appeals.

In response, Agency submits that the AJ correctly determined that that an award of attorney's fees to Employee was not warranted in the interest of justice. Agency states that it did not engage in a prohibited personnel practice and that its RIF action was conducted in good faith. It further reasons that the amount of Employee's fee request is unreasonable in comparison to the amount of back pay she actually received. Finally, Agency states that the statutory language of D.C. Official Code § 1-606.08 makes the award of attorney's fees discretionary, not mandatory. Consequently, it asks this Board to deny Employee's Petition for Review.

**C. Deliberations** – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Official Code § 2-575(b)(13).

**D. Open Portion Resumes**

**E. Final Votes on Cases**

**F. Public Comments**

**VI. Adjournment**